No. 80-356

In the Supreme Court of the United States

OCTOBER TERM, 1980

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., ET AL., PETITIONERS

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in approving applications of three bank holding companies seeking to sell credit-related insurance, the Federal Reserve Board made the determination, required by Section 4(c)(8) of the Bank Holding Company Act of 1956, that the probable public benefits resulting from approval of these applications would outweigh the possible adverse effects.

2. Whether the Federal Reserve Board's decisions approving the applications are supported by substantial evidence.

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OPINION BELOW

The decision of the court of appeals (Pet. App. 16a-17a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1980 (Pet. App. 16a-17a). A petition for rehearing was denied on June 10, 1980 (Pet. App. 18a-19a). The petition for a writ of certiorari was filed on September 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

Section 4(c)(8) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(c)(8), provides that a bank holding company may acquire:

> shares of any company the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. In orders and regulations under this subsection, the Board may differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or in part, of a going concern.

12 C.F.R. 225.4(a)(9) designates the following activities as being "closely related to banking or managing and controlling banks":

> (9) Acting as insurance agent or broker in offices at which the holding company or its subsidiaries are otherwise engaged in business (or in an office adjacent thereto) with respect to the following types of insurance:
>
> * * * * *
>
> (ii) Any insurance that (*a*) is directly related to an extension of credit by a bank or a bank-related firm of the kind described in this regulation, or (*b*) is directly related to the provision of other financial services by a bank or such a bank-related firm * * * .

STATEMENT

1. Section 4(c)(8) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(c)(8), authorizes the Federal Reserve Board to approve applications by bank holding companies seeking to engage in certain non-banking activities that are "so closely related to banking or managing or controlling banks as to be a proper incident thereto." Prior to approving such an application, the Board must determine that the activity in question is "closely related to banking" and that performance of the proposed activity by a particular bank holding company would produce benefits to the public that reasonably may be expected to outweigh its possible adverse effects.

The Board has determined by regulation that a number of non-banking activities are "closely related to banking" within the meaning of Section 4(c)(8). One of the approved activities is the sale of credit-related insurance. See 12 C.F.R. 225.4(a)(9). The Fifth Circuit has affirmed the Board's determination that this activity is permissible for bank holding companies. See *Alabama Ass'n of Ins. Agents* v. *Board of Governors*, 533 F. 2d 224 (1976), modified on rehearing, 558 F. 2d 729 (1977), cert. denied,

435 U.S. 904 (1978). Petitioners in this case do not challenge the Board's generic determination that the sale of credit-related insurance is an activity closely related to banking. Rather, they challenge the Board's determination in three particular cases that a bank holding company's engagement in the sale of credit-related insurance can reasonably be expected to produce benefits to the public that outweigh adverse effects.

2. In 1978 and 1979, First National State Bancorporation, New Mexico Bancorporation, and Pittsburgh National Corporation, filed applications with their local Federal Reserve Banks for approval to sell certain types of credit-related insurance (C.A. App. 1-20, 137-143, 212-213).[1] Each bank holding company proposed to engage in this activity by establishing a newly organized subsidiary ("*de novo* entry"), rather than by acquiring an existing insurance company.[2] Petitioners, a national association of insurance agents and three constitutent state associations, opposed the applications. The administrative record relating to each application was thereafter supplemented by the applicants in response to petitioners' objections. Petitioners' objections were then reviewed by the appropriate Federal Reserve Bank and the Board of Governors of the Federal Reserve System. The applications of New Mexico Bancorporation and Pittsburgh National Corporation were then approved; the

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[1]"C.A. App." refers to the joint appendix filed in the court of appeals.

[2]The Board has provided simplified procedures for obtaining approval of applications to engage *de novo* in a line of business that the Board previously has determined by regulation to be closely related to banking. See 12 C.F.R. 225.4(b)(1).

application of First National State Bancorporation was approved in substantial part (Pet. App. 1a, 4a, 7a, 11a, 14a).

The court of appeals affirmed the Board's orders without opinion (Pet. App. 16a-17a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In approving each application involved in this case, the Federal Reserve Board and its local Federal Reserve Banks made the finding of public benefits required by the statute. Those findings are supported by substantial evidence.

1. Petitioners plainly err (Pet. 4-8) in contending that the Board failed to make the finding required under Section 4(c)(8) that the applicants' proposed new activities "can reasonably be expected to produce benefits to the public * * * ." With respect to each application, either the Board or the local Federal Reserve Bank acting under delegated authority (12 C.F.R. 265.2(f)(20)(i)) made the necessary public benefits finding.

First National State Bancorporation's application under Section 4(c)(8) included an extensive discussion of the public benefits that reasonably could be expected to result from its new operations (C.A. App. 17-20).[3] The applicant's discussion of public benefits was analyzed by the staff of the Federal Reserve Bank in New York (C.A. App. 59) and formed the basis for an express finding by the Federal Reserve Bank that the public benefits test was satisfied (C.A. App. 63): "Based upon the foregoing and

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[3] The Federal Reserve Bank requested additional public benefits information from the applicant before approving its application in part (see C.A. App. 106; Pet. App. 3a).

other considerations reflected in the record this [Federal Reserve] Bank has determined that the public interest factors the Board is required to consider under Section 4(c)(8) * * * outweigh possible adverse effects."

Similarly, in approving New Mexico Bancorporation's application, the Federal Reserve Bank in Kansas City expressly found that "the public interest factors the Board of Governors of the Federal Reserve System is required to consider under Section 4(c)(8) outweigh possible adverse effects" (Pet. App. 5a). The Federal Reserve Bank noted "it does not appear that consummation of the proposal would tend to result in an undue concentration of resources, unfair competition, conflict of interest, or unsound banking practices" (*ibid.*). Petitioners' objections to this decision were then reviewed by the Federal Reserve Board's legal staff (C.A. App. 207). The Board thereafter declined to review the decision of the Federal Reserve Bank and its letter to petitioners responded to each of their objections (Pet. App. 7a-9a). With respect to the public benefits issue, the Board found that "there is substantial information in the record upon which the Reserve Bank could make a 'public benefits' determination under section 4(c)(8) of the Act" (Pet. App. 8a).

Finally, with respect to Pittsburgh National Corporation's application, the Federal Reserve Bank in Cleveland expressly determined that the public benefits test was satisfied (Pet. App. 12a): "the public interest factors the Board is required to consider * * * outweigh possible adverse effects." In denying petitioners' request to review that determination, the Board advised petitioners that their opposition was not raised in a timely manner and also noted that their opposition presented no substantial issues (Pet. App. 14a). The Board's legal staff

previously had explained that petitioners failed to "contradict the Federal Reserve Bank's determination that the proposal would yield net public benefits * * * " (C.A. App. 261).

Although the Board's explanation in each case was concise, "it surely indicated the determinative reason for the final action taken * * * ." *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973). In the context of this case, the Board's explanation was sufficient. The applications in each case sought permission to engage in an activity that the Board previously had determined to be closely related to banking and a proper incident thereto. Moreover, in each case the applicants sought to engage in new activities on a *de novo* basis, without acquiring any other business firm or otherwise threatening competition. As the D.C. Circuit recently explained in *Connecticut Bankers' Ass'n* v. *Board of Governors*, No. 79-1554 (Feb. 7, 1980), slip op. 19:

> Implicit in Regulation Y is the Board's reasoned determination that the permissible activities, including * * * the sale of credit-related insurance, can generally be expected to achieve net public benefits. A specific proposal to engage in otherwise permissible conduct may provide negative results. But a protestant has some burden, albeit minimal, to show that the Board's general determination is not applicable.

The court of appeals added that this conclusion applies *a fortiori* when permission is sought to engage *de novo* in an activity that the Board previously has found to be closely related to banking. *Id.* at 19-20.

Because the Board made express findings of public benefits in this case, the decision of the court of appeals does not conflict with the decisions that petitioners cite

(Pet. 7-9).[4] And in light of those findings, this case does not raise the question whether the Board may approve an application under Section 4(c)(8) based solely on an absence of adverse effects.[5]

2. The court of appeals rejected petitioners' argument that the Board's decisions were unsupported by substantial evidence. Further review by this Court of the substantial evidence issue is unwarranted. See *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974).

In any event, there is no merit to petitioners' contention (Pet. 9) that the administrative records in these cases fail to show likely public benefits. To be sure, the Board

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[4]The cases cited by petitioners have little relevance here. *American Bancorporation* v. *Board of Governors*, 509 F. 2d 29, 38 (8th Cir. 1974), *Independent Bankers Ass'n* v. *Board of Governors*, 516 F. 2d 1206, 1227 (D.C. Cir. 1975), and *Florida Ass'n of Ins. Agents, Inc.* v. *Board of Governors*, 591 F. 2d 334, 340-343 (5th Cir. 1979), all dealt with the question whether the Board must consider specific objections to applications and conduct a hearing when necessary to resolve adjudicative facts. In this case, the Board analyzed petitioners' objections and found that none of them warranted denial of the present applications. *Alabama Ass'n of Ins. Agents* v. *Board of Governors*, *supra*, 533 F. 2d at 254, upheld the Board's public benefits analysis in a related context, and *Citicorp* v. *Board of Governors*, 589 F. 2d 1182, 1190-1191 (2d Cir. 1979), upheld the Board's denial of an application on public interest grounds. Neither of these cases supports petitioners' arguments here.

[5]Petitioners claim (Pet. 5 & n.7) that the Board's attorneys argued in the court of appeals that the mere absence of adverse effects is sufficient to approve an application. However, the Board's counsel clearly stated that affirmance of the Board was required because the public benefits here involved outweigh adverse effects (Resp. Br. 42-43): "In the absence of any adverse effects, and because *de novo* entry into a previously approved * * * activity reasonably can be expected to be pro-competitive and to provide additional public benefits, approval of these applications is clearly warranted under the express terms of Section 4(c)(8), and the Board properly approved each of the applications involved here on the basis that reasonably expected public benefits outweigh possible adverse effects."

advised petitioners (Pet. App. 8a) that the required finding of public benefits from the proposed *de novo* entry of New Mexico Bancorporation could be based on information regarding the lines of insurance to be sold, the location of the proposed new activities, and the holding company's commitment to comply with the legal requirements of the Bank Holding Company Act of 1956. That information provides a prima facie showing of probable public benefits in the absence of any record evidence suggesting the contrary. By offering a new insurance service in the local banking community, the applicant helps to satisfy public demand for that service. Moreover, *de novo* entry itself is an important source of public benefits, because it increases competition in the marketplace. The positive contribution made by *de novo* entry is reflected by the express terms of the statute, which permit the Board to "differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or in part, of a going concern." 12 U.S.C. 1843(c)(8). The legislative history also emphasizes the public benefits to be expected from *de novo* entry. See S. Rep. No. 91-1084, 91st Cong., 2d Sess. 15-16 (1970); H.R. Rep. No. 91-1747, 91st Cong., 2d Sess. 17-18 (1970). The courts of appeals likewise have recognized the probable public benefits resulting from *de novo* entry. See *Connecticut Bankers' Ass'n* v. *Board of Governors*, *supra*, slip op. 19-20; *Alabama Ass'n of Ins. Agents* v. *Board of Governors*, *supra*, 533 F. 2d at 249.

In short, in view of the Board's prior determination that the sale of credit-related insurance is an activity closely related to banking and is a proper incident thereto, and in view of the probable increase in competition resulting from *de novo* entry and the provision of new services to consumers, the Board did not err in finding that net public benefits could reasonably be expected from approval of the applications in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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